STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2003
v	No. 237786 Wayne Circuit Court
MCKINLEY DALTON, III, Defendant-Appellant.	LC No. 00-008283-01

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(e) (armed with a weapon), and was sentenced to 80 to 120 months' imprisonment. He appeals as of right. We affirm.

Defendant was convicted of sexually assaulting a woman with whom he had had a ten-year relationship. The complainant testified that defendant came to her home and asked her for money. She gave him money and he left. Defendant returned at least an hour later. He appeared to have been drinking. His shirt was torn, he had a bruise on his face, he was angry, and he had no money. Defendant told her that he had had an altercation with the police and that the police officers took his money. He got a knife from the kitchen and wrapped the handle of the knife in electrical tape. The complainant started crying in her bedroom because defendant did not have the money and she assumed that he was not going to go to work.

At that point, defendant became angry with the complainant. He went into her bedroom, wedged her door shut, turned up the volume of her music, and pushed her onto the bed. Defendant called the complainant a "bitch" and put his hand around her neck. Then defendant held the knife to her neck and threatened to kill her and her children. He cut off the complainant's nightgown and panties with the knife and vaginally penetrated her. The complainant testified that she did not consent to defendant's actions.

Defendant and the complainant fell asleep. When the complainant awoke, she gathered some clothes, took the knife from the bedroom, and called the police. She was crying and distraught when the police arrived. The police arrested defendant as he lay naked in the

complainant's bed. They recovered the knife and the cut clothing. The complainant had cuts on her neck and bruising on various parts of her body.[1]

I. Statement to Police Officers

Defendant argues that the trial court erred by allowing two female police officers to testify that while transporting defendant after his arrest, he told them, "T[a]ke your uniform off bitches and I'll show you what kind of a man I am."[2] Defendant objected at trial, arguing that the testimony was inadmissible because he had not been advised of his *Miranda*[3] rights. The trial court allowed the testimony because defendant's statement was not made in response to questioning by the officers.

The basis for defendant's objection below differs from the basis he now asserts on appeal. Although defendant notes that he was not advised of his *Miranda* rights, he does not argue on appeal that the statement was inadmissible under *Miranda*. Rather, he argues that the statement should have been excluded because (1) it was not an admission contradicting any position taken at trial by the defense; (2) it was not relevant; and (3) even if relevant, its probative value was substantially outweighed by the prejudicial effect of the statement. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Accordingly, this claim is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We find no plain error. The evidence was relevant to corroborate the complainant's testimony that defendant was intoxicated, hostile, and referred to her as "bitch" numerous times during the episode. It does not matter whether the statement was an admission or whether it contradicted any defense proofs. MRE 801(d)(2) contains no requirement that an admission by a party contradict any proofs. Further, the statement was not hearsay under MRE 801(c) because it was not offered to prove the truth of the matter asserted.

II. Effective Assistance of Counsel

Defendant next argues that he was denied the effective assistance of counsel because his trial counsel (1) failed to file a motion to suppress evidence of the knife; (2) failed to object to testimony about the knife, which defendant argues was inflammatory and irrelevant; (3) failed to contact alibi witnesses; and (4) failed to investigate the case. Defendant did not move the trial court for a new trial or a *Ginther*[4] hearing. Therefore, our review of this issue is limited to errors

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[1] The primary defense was that the complainant and defendant had engaged in consensual relations, and the complainant's injuries were the result of a fight she had with her sister.

[2] One of the officers said that defendant appeared to be "a little bit intoxicated" at the time. Defendant denied making the statement.

[3] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

We find no merit to defendant's argument. He contends that all evidence relating to the knife should have been suppressed because "defendant had not been directly linked to the weapon." We disagree. The complainant specifically identified the knife – which bore the distinctive characteristic of being wrapped in electrical tape – as the knife that defendant handled before the sexual assault, the knife that he put to her neck at the commencement of the assault, the knife that she believed was in defendant's hand during the assault, and the knife she took from the bedroom after the assault ended. Counsel was not ineffective for failing to object to the admission of the instrumentality of the crime. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001) ("A trial attorney need not register a meritless objection to act effectively."); *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant also claims that trial counsel was ineffective for failing to call "known" alibi witnesses. Defendant does not identify those witnesses or present their proposed testimony. We find no basis in the record to conclude that alibi witnesses exist or that their undisclosed testimony would have been helpful to defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Although defendant alleges in his statement of the issue that trial counsel failed to investigate the case, the body of his brief does not address this allegation. Accordingly, we deem that portion of the issue abandoned. *People v Knapp*, 244 Mich App 361, 374 n 4; 624 NW2d 227 (2001); *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992).

On the record before us, defendant has not sustained his burden of showing that trial counsel's performance was deficient such that he was denied the effective assistance of counsel. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Nor are we persuaded of the need to remand for an evidentiary hearing on the matter.

III. Sufficiency of the Evidence

Finally, defendant argues that the prosecutor did not present sufficient evidence to support a finding of guilt. Defendant argues that the court should not have accepted the complainant's testimony. We must determine whether, when the evidence is viewed in the light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985).

The elements of the offense were adequately established by the complainant's testimony that defendant engaged in sexual intercourse with her after threatening her with a knife and after cutting off her nightgown and underwear. MCL 750.520b(1)(e). The complainant testified that she did not consent. This was a classic credibility contest between diametrically opposing

versions. An argument that a witness was not credible affects the weight of evidence, not the sufficiency, and will not be resolved on appeal. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Michael J. Talbot